Supreme Court, U.S.
FILED

(1)

No. 971684

APR 14 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GLORIA C. PHARES
JEFFREY H. BLUM
PATTERSON, BELKNAP, WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

R. BRUCE RICH
BERNADETTE M. MCCANN EZRING
JONATHAN BLOOM
MARC BROTMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

DAVID D. COLE
Counsel of Record
CENTER FOR CONSTITUTIONAL RIGHTS
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Attorneys for Petitioner

88 pp

QUESTIONS PRESENTED

Petitioner contracted with Amtrak to display an advertisement urging people not to buy Coors beer for political reasons. When Amtrak saw the advertisement, it refused to display it, based on an asserted policy—unwritten and previously unenforced—against "political advertising." The questions presented are:

I. Whether, in its public forum analysis, the court of appeals erred by accepting Amtrak's *post hoc* assertions about the forum and ignoring objective evidence concerning Amtrak's prior practice and experience in implementing its stationwide advertising policy.

II. Whether Amtrak discriminated on the basis of viewpoint where (a) it previously had permitted the display of conservative political advertising; and (b) it would have permitted petitioner's ad had he addressed the same subject matter from a commercial rather than a political viewpoint.

III. Whether Amtrak's unwritten and undefined policy against "political" advertising was unconstitutionally vague under this Court's decision in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), which held impermissibly vague the term "political . . . cause."

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays, Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
1. Introduction	2
2. Statement of Facts	4
Penn Station and the Spectacular	4
Lebron-Amtrak Contract	5
Amtrak's Advertising Policy	6
Amtrak's Advertising Practices at Penn Station	7
Amtrak's Related Free Speech Activities	8
3. Prior Proceedings	8
REASONS FOR GRANTING THE WRIT	11

PAGE

I. The Court of Appeals' Refusal to Consider Objective Evidence of Amtrak's Past Display of Political Advertising in Penn Station to Assess the Nature of the Forum Conflicts With Decisions of this Court and Several Circuits 13

II. The Panel's Decision that Amtrak's Policy Is Viewpoint-Neutral Conflicts with Decisions of This Court and Other Circuits . 18

III. The Panel's Decision that Amtrak's Policy is Not Unconstitutionally Vague Conflicts with This Court's Decision in *Hynes v. Mayor of Oradell* 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1 (1st Cir. 1994) 13, 18, 19

Air Line Pilots Ass'n v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995) 13-15, 19, 22, 23

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996) 13, 19

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 22, 23

Concerned Women for America, Inc. v. Lafayette Cty., 883 F.2d 32 (5th Cir. 1989) 15

PAGE

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 15

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 23

Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) 13, 20

Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991) 15

Hevesi v. Metropolitan Transp. Auth., 827 F. Supp. 1069 (S.D.N.Y. 1993) 23

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 13, 21-23

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 12, 16, 18

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 12, 18, 20, 21

Lebron v. National R.R. Passenger Corp. (Amtrak), 116 S. Ct. 1675 (1996) 4

Lebron v. National R.R. Passenger Corp. (Amtrak), 513 U.S. 374 (1995) 3

Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650 (2d Cir. 1995) 1

Lebron v. National R.R. Passenger Corp. (Amtrak), 12 F.3d 388 (2d Cir. 1993) 1

Lebron v. National R.R. Passenger Corp. (Amtrak), 981 F. Supp. 279 (S.D.N.Y. 1997) 4

PAGE

Lebron v. National R.R. Passenger Corp. (Amtrak), 881 F. Supp. 993 (S.D.N.Y. 1993) 1

Lebron v. Washington Metropolitan Transit Auth., 749 F.2d 893 (D.C. Cir. 1984) 23

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 20-23

Paulsen v. County of Nassau, 925 F.2d 65 (2d Cir. 1991) 15

Penthouse Int'l, Ltd. v. Koch, 599 F. Supp. 1338 (S.D.N.Y. 1984) 23

Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983) 15

Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) 23

Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) 12, 20, 21

Stewart v. District of Columbia Armory Bd., 863 F.2d 1013 (D.C. Cir. 1988) 15

Streetwatch v. National R.R. Passenger Corp., 875 F. Supp. 1055 (S.D.N.Y. 1995) 4

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 23

United States v. Kokinda, 497 U.S. 720 (1990) 12, 16

Constitution, Statutes:

U.S. Const., amend. I ..... *passim*

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. _____

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Michael A. Lebron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals on which this petition is based (App., *infra*, 1a-24a) is reported at 69 F.3d 650; its revised opinion on re-hearing (*id.* at 1b-6b) is reported at 89 F.3d 39.[1] The opinion of the district court (*id.* at 1c-22c) is reported at 811 F. Supp. 993.

[1] "App." refers to the appendix to this petition. "A," "E," and "SE" refer respectively to the following documents in the court of appeals: the appendix, the exhibit volumes, and the supplemental exhibit volume.

JURISDICTION

The final order of the court of appeals was entered on January 14, 1998 (App., *infra*, 1d-4d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment states in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech. . . .

STATEMENT

1. Introduction

This case arises out of a decision by the National Railroad Passenger Corporation ("Amtrak") not to display petitioner Michael A. Lebron's advertisement on a billboard in New York's Pennsylvania Station ("Penn Station"). Lebron's advertisement urges viewers not to buy Coors beer because the Coors Brewing Company supports various conservative causes. In rejecting the ad, Amtrak invoked an unwritten and undisseminated stationwide policy against "political" advertising. Amtrak had never before rejected an ad for display anywhere in Penn Station on the ground that it was political, and had permitted the display of political ads for years.

The district court, per then-District Judge Pierre N. Leval, found that: (1) Amtrak had in fact displayed numerous political ads in Penn Station in the past; (2) Amtrak's written standards permitted noncommercial public service advertising; (3) many of the people responsible for Amtrak advertising had never even heard of the asserted unwritten policy; and (4) those who had heard of the policy could not coherently define it. The court therefore held that Amtrak's policy against political advertising violated the Constitution because

it was unwritten, vague, inconsistently applied, and potentially viewpoint-based (depending on which of the many different definitions of the policy applied).

The court of appeals reversed, with then-Chief Judge Jon O. Newman dissenting.[2] App., *infra*, 1a, 18a. The court rested its decision on what it characterized as its "finding" that Amtrak had two policies—one limited to the Spectacular, the particular billboard to which Lebron sought access, and another governing advertising in the rest of Penn Station. *Id.* at 15a, 16a. As a result, the panel deemed irrelevant Amtrak's past advertising practices on other billboards in Penn Station, and held that Lebron lacked standing to challenge Amtrak's general Penn Station advertising policy because it had not been applied to him. *Id.* at 16a-18a.

Lebron sought rehearing on the ground that the linchpin of the panel's decision—its "finding" that there was a unique policy applying only to the Spectacular—was contrary to both the district court's finding *and* Amtrak's admission that one set of advertising standards governed all of Penn Station. The panel then issued an amended opinion, deleting its erroneous "finding," but failing to change its legal analysis in any respect. App., *infra*, 1b-4b. Judge Newman dissented again, maintaining that once the panel acknowledged that there was only one policy, its legal analysis had no foundation. *Id.* at 4b-6b. In its amended opinion, the panel also *sua sponte* reinstated to the district court the state contract claims it had dismissed in 1993, despite the fact that Lebron had not asked that these claims be reinstated.

---

[2] By the same divided vote, the panel initially reversed on state action grounds, holding that Amtrak was a private entity not subject to constitutional constraints. 12 F.3d 388 (2d Cir. 1993). This Court reversed, holding that Amtrak is a governmental actor for constitutional purposes, and remanded to the court of appeals to permit it to address Lebron's First Amendment claims. *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 513 U.S. 374 (1995).

When Lebron petitioned for certiorari from this decision, Amtrak's first ground for opposing certiorari was that "the case is not ripe for review, because petitioner's contract claim remains to be decided by the courts below." Amtrak's Brief in Opposition at 2. This Court denied certiorari. 116 S. Ct. 1675 (1996).

The case was remanded to the district court to resolve petitioner's contract claims, and on October 23, 1997, the district court dismissed the remaining contract claims. *Lebron v. National Railroad Passenger Corp. (Amtrak)*, 981 F. Supp. 279 (S.D.N.Y. 1997). Petitioner appealed only from Claims 1, 2, and 3 of the Complaint relating to his constitutional claims. Because the court of appeals' 1995 decision (App. 1a-24a, 1b-6b) on those issues was the law of the case, the parties jointly moved for summary affirmance, which the court of appeals granted (App., *infra*, 1d-4d).

2. Statement of Facts

The facts, as found by the district court and stipulated by Amtrak (SE2365-68, SE2381-84), are as follows:

Penn Station and the Spectacular. Penn Station, owned by Amtrak, is one of the busiest public crossroads of pedestrian traffic in New York City. Approximately 200,000 people pass through the station every day going to and from the Amtrak, New Jersey Transit, and Long Island Railroad trains that use the station, and the New York subway that abuts it. SE2365; A338-39, A341; *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1057 (S.D.N.Y. 1995).

Penn Station is a large, multi-purpose facility. Its upper level, where the Spectacular billboard at issue here is located, combines the railroad station with numerous restaurants and shops, providing an underground "Main Street" for the traveling public. The station includes a bookstore, several newsstands, a jewelry store, bakeries, novelty and souvenir shops, drugstores, several restaurants and fast food shops, a bank,

clothing stores, a cutlery shop, bars, flower stalls, and an electronics store. A517; E1297-1303.

Amtrak leases space to advertisers throughout Penn Station, on numerous billboards, dioramas, and kiosks. The Spectacular billboard is a large, curved, back-lit display space approximately 103 feet long by 10 feet high, located on the east-facing wall of the station's rotunda. App., *infra*, 2c. Immediately in front of the Spectacular in the rotunda is a four-sided advertising kiosk.

Lebron-Amtrak Contract. Lebron first contacted Transportation Displays Incorporated ("TDI"), Amtrak's advertising agent, about leasing billboard space in Penn Station in August 1991. App., *infra*, 2c. Lebron told TDI that his work was "political," and showed TDI's representative examples of his prior political work.[3] TDI never suggested that the political nature of the work would be a problem, and assured Lebron that while obscene or violent displays would not be accepted, there were no other policy restrictions on advertising. *Id.* at 3c.

Lebron and TDI signed a contract on November 30, 1992, leasing the Spectacular to Lebron for January and February 1993. App., *infra*, 3c. On December 2, 1992, Lebron provided TDI with a copy of his work pursuant to the contract provision that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation." *Id.*

The work is a photomontage with text, in the style of a beer advertisement, which urges would-be purchasers not to buy Coors beer because the owners of the Coors Brewing Company support various conservative causes. *See* E2211. It states clearly that Lebron paid for the work, and explicitly disclaims any association with the work by "TDI, Amtrak, or The Port

---

[3] SE2375-76; A160-65, A167-68, A170-71, A174-75, A212-13; A586- 88; E2137-41.

Authority of New York & New Jersey." SE2370; A230, A252; E2213.

TDI sent Lebron's work to Amtrak. App., *infra*, 4c. Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development responsible for advertising on Amtrak property, rejected Lebron's work, claiming that Amtrak had a "policy" against "political" advertisements. *Id.*[4]

Amtrak's Advertising Policy. The policy that Amtrak asserted, *ex post*, to reject Lebron's ad was unwritten, undisseminated, and undefined.[5] Amtrak's executives "were themselves at odds over the meaning of Amtrak's policy." App., *infra*, 17c.

DeAngelo testified that Amtrak's "policy" prohibits advertisements that are "objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." A349. He defined "objectionable to the riding public" as:

> Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

A378. DeAngelo initially defined "political" as "mostly noncommercial," A352, but stated that advertisements that do not sell products are only "potentially" political. A354.

---

[4] When Amtrak rejected Lebron's ad, TDI offered to rent Lebron space on other billboards in New York, but did not offer any billboard space in Penn Station, in light of Amtrak's asserted policy.

[5] Several expired and superseded contracts governing Penn Station advertising included references to a policy against political advertising, App., *infra*, 15c, but, as the district court noted, the contracts in force when this dispute arose contained no such language. *Id.* at 16c. In fact, the TDI-Amtrak contract in force when this dispute arose expressly *permitted* the display of public service and nonprofit advertising in Penn Station. *Id.* at 19c.

Others had different understandings. Bruce Bourque, who conducts the initial reviews of advertising for the Spectacular (and also reviewed Lebron's work), admitted that he "could not really say what [a policy barring 'political' advertising] meant." App., *infra*, 17c. Bourque identified many commercial advertisements as "political." A835-36, A843; E306. William Delaney, who also reviews advertising content for Amtrak, had never even *heard* of a policy against political or any other advertising (other than a prohibition on competitive advertising). App., *infra*, 16c. No one at TDI, Amtrak's agent for all Penn Station advertising, was aware that Amtrak had a policy against political advertising.[6] *Id.*

DeAngelo has never informed members of his staff responsible for inspecting advertising in Amtrak stations of any policy against political advertising. The staff is simply expected to use its "common sense" in evaluating whether advertisements are "contributing to the overall effectiveness" of the station. A359-60, A362-65, A386-88.

Amtrak's Advertising Practices at Penn Station. Amtrak maintained both in the district court and on appeal that its policy against political advertising applied to all advertising in Penn Station. SE2384; Resp. CA Br. at 7. Yet until this case, Amtrak had never disapproved a single ad as "political" or "objectionable." A371-72, A384-85, A755-57, A770-71; A823. In fact, Amtrak consistently had displayed political advertising at Penn Station, without a single objection from the riding public. A392-93, A617. For example, since at least 1988, The Worldwide Church of God had leased a four-sided, seven-foot high kiosk immediately in front of the Spectacu-

---

[6] TDI's own advertising guidelines, upon which its agents rely, expressly permit political and other ideological advertising. A628; E176. They also permit public service advertising, defined as "non-commercial, non-partisan" advertisements not designed to influence elections or legislation. E178. TDI's public service advertising has included subjects such as homelessness, the environment, drunk driving, AIDS awareness, health issues, and race relations. A622, A626.

lar to advertise and distribute *The Plain Truth*, a free noncommercial magazine addressing social and political issues such as homosexuality, gambling, and the Arab-Israeli conflict. App., *infra*, 7a, 20c. *The Plain Truth* ad displayed when this suit commenced featured a magazine cover urging readers to "Say No To Adultery." A256-57; E202-03.[7] Amtrak has also leased space in Penn Station to other noncommercial and/or political advertisers, including the New York Department of the Environment, the New York Department of Commerce, and a muscular dystrophy foundation. *Id.*

Amtrak's Related Free Speech Activities. Amtrak's "Regulations For Exercise Of Certain Free Speech Rights In Pennsylvania Station, NYC," permit distribution of literature, display of placards and engagement of passersby in conversation about "religious, political or other views to the extent protected by the First Amendment . . . of the Constitution." SE2396; E114-120. Pursuant to these guidelines, Amtrak has permitted a variety of individuals and organizations to distribute political literature, engage in political discussions, and solicit funds for political causes within Penn Station, all without any adverse consequences to the "riding public." SE2396-97; E117, E287-88, E290, E292-93.[8]

3. Prior Proceedings

A. The district court concluded that Amtrak's policy was unconstitutional because it was unwritten, vague, had been applied in a discriminatory fashion, and might constitute viewpoint discrimination, depending on which of the many

---

[7] The kiosk had bins attached to it containing copies of the magazine for free distribution to the public. E202-03.

[8] Amtrak also leases space to numerous book stores and news stands in Penn Station, which sell books and magazines on political issues. E1297-1303. Amtrak does not prevent these proprietors from selling or advertising literature with political messages. A518. And no one has ever complained about the political content of books or magazines sold by Penn Station retailers. A519.

definitions Amtrak had offered was in fact applicable. App., *infra*, 15c-22c. In reaching this result, the court found (and Amtrak stipulated) that the policy invoked against Lebron was not specific to the Spectacular, but applied throughout Penn Station. *Id.* at 20c n.12; SE2384.[9] Because one policy governed all of Amtrak's Penn Station advertising, the district court examined how the policy had been implemented throughout the station to determine its scope and application. App., *infra*, 19c-20c.

B. The court of appeals reversed in a divided opinion. As noted above, the panel majority based its reversal on a "finding" that there were two separate policies, one limited to the Spectacular, and another for the rest of Penn Station advertising. App., *infra*, 15a, 16a. In light of this finding, it deemed irrelevant evidence of political advertising in the rest of Penn Station, and it concluded that Amtrak's Spectacular policy had been consistently applied because no political ads had been displayed on the Spectacular itself.[10] *Id.* at 15a, 16a.

The panel's presumption that the policy at issue was limited to the Spectacular was central to each of its legal conclusions. First, the Court concluded that the Spectacular is "a nonpublic forum, or perhaps . . . a limited public forum opened for purely commercial speech," only by ignoring the fact that Amtrak had displayed numerous political and non-commercial ads under the same policy that governed the Spectacular. App., *infra*, 11a. Second, the panel found the

---

[9] According to Amtrak, the *only* difference between its treatment of the Spectacular and other advertising space in Penn Station is procedural: with other advertising spaces, Amtrak applies its policy against "political" advertising after advertisements are displayed, whereas with the Spectacular, it applies that policy before the advertisement is displayed. The substantive content of the policy, however, is the same. SE2390; A359-60; A374-75, A383-84; A607-08.

[10] There had been only six previous advertisers on the Spectacular, which tended to be leased out for long-term contacts. None of these prior advertisers had sought to display a political ad. Resp. CA Br. at 7 n.5.

policy "reasonable . . . to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view," *id.* at 13a, 14a, again only by disregarding the fact that Amtrak had accepted other political messages in Penn Station without triggering any criticism or embarrassment. And third, the panel's conclusion that Amtrak's policy was neither viewpoint-based nor vague depended on its finding that Amtrak had not permitted political advertising previously on the Spectacular. App., *infra*, 14a-15a, 15a-16a.

Then-Chief Judge Newman dissented. App., *infra*, 18a. He criticized the panel's failure to consider Amtrak's treatment of advertising throughout Penn Station. Under the panel's view, he reasoned, Amtrak could deny use of the Spectacular for Republican Party advertising even if it had permitted the Democratic Party to advertise on one of the dioramas flanking the Spectacular. *Id.* at 20a-21a. In Judge Newman's view, "Amtrak's violation of the First Amendment is evident, because it has leased advertising space on a kiosk in the rotunda for *The Plain Truth*, a magazine the Court acknowledges is devoted to 'political and social issues.' " *Id.* at 21a.

Judge Newman also criticized the majority's conclusion that Amtrak's policy was not vague simply because it had not previously permitted political ads on the Spectacular. "[W]here a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation." App., *infra*, 21a. "The vice of conferring discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination . . . ." *Id.* at 22a-23a.[11]

---

[11] While he found it unnecessary to reach the question given the policy's other constitutional infirmities, Judge Newman also observed that Amtrak's policy may constitute viewpoint discrimination, because it allows ads promoting the sale of beer for commercial reasons, but bars an ad opposing the purchase of the same product for political reasons. App., *infra*, 23a-24a.

C. Petitioner sought rehearing, pointing out that the so-called "finding" on which every one of the panel's legal conclusions was grounded conflicted with the district court's finding (and Amtrak's stipulation) that Amtrak's advertising policy applied to all advertising in Penn Station and not just to the Spectacular. In response, the panel majority denied rehearing and issued an amended opinion in which it simply deleted the sentences that had expressly referred to its "finding" of a Spectacular-specific policy. App., *infra*, 3b. It made no substantive change in its legal analysis or conclusion.

Dissenting from the denial of rehearing, Judge Newman noted that the deletions from the court of appeals' decision "leave the Court's legal analysis . . . even more vulnerable than I thought it was in my original opinion." App., *infra*, 5b. Judge Newman observed that none of the legal conclusions in the court's revised opinion had a factual foundation. *Id.* at 5b-6b. Moreover, he maintained, "no matter what the scope of the forum, a governmental entity violates the First Amendment when it bars display of political messages pursuant to a 'policy' that has been found by a fact-finder, with abundant evidentiary support, to be vague, unwritten, undisseminated, unclear to those who administer it, and inconsistently applied." *Id.* at 6b.

REASONS FOR GRANTING THE WRIT

Before Michael Lebron came along, Amtrak had regularly permitted the display of political advertising in Penn Station, and had never rejected any ad for its political content. Yet the panel majority held that Amtrak could refuse to display Lebron's advertisement by asserting a policy against "political" advertising that was unwritten, undisseminated, undefined, and never before invoked. There are three reasons to grant a writ of certiorari.

First, the panel's conception and application of the public forum doctrine conflicts with decisions of this Court and several federal courts of appeal. The panel concluded that the Spectacular was a nonpublic forum by accepting Amtrak's *post hoc* assertions regarding its policy and ignoring Amtrak's actual practice in implementing that policy throughout Penn Station. Several members of this Court have stressed the dangerous circularity of predicating public forum analysis on governmental assertions that a forum is closed to a particular type of speech without carefully examining the property's past uses and physical characteristics.[12] When one looks at Amtrak's practice rather than its words, it is clear that Amtrak created a designated public forum for political ads by accepting them in the past under the same policy, and then impermissibly discriminated against Lebron. This case presents the opportunity to clarify that public forum analysis must look to the objective characteristics and practices of the government forum, rather than merely accepting *post hoc* government rationales.

Second, the panel erred in concluding that Amtrak had not engaged in viewpoint discrimination, where it simultaneously permitted the display of conservative political ads, and where Amtrak's policy permitted the display of commercial viewpoints on the same subject matter addressed by Lebron's noncommercial ad. This analysis conflicts with two decisions of this Court holding that bans on "religious" speech constitute viewpoint discrimination where nonreligious speech on the same subject matter is permitted;[13] and with decisions of the

---

[12] *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring); *id.* at 740 (Brennan, Marshall, Stevens, Blackmun, JJ., dissenting); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, Blackmun, Stevens, Souter, JJ., concurring in the judgment).

[13] *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

First, Seventh, Tenth and Eleventh Circuits, finding viewpoint discrimination in similar circumstances.[14] In particular, the decision conflicts with a Seventh Circuit decision that invalidated a policy against "political" advertising virtually identical to that which the Second Circuit upheld.[15]

Third, the panel's holding that Amtrak's policy against "political" advertising was not vague conflicts directly with *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). *Hynes* declared a policy restricting solicitation for "political" causes to be impermissibly vague because "political" was undefined, yet the Second Circuit upheld the same undefined term.

I. The Court of Appeals' Refusal to Consider Objective Evidence of Amtrak's Past Display of Political Advertising in Penn Station to Assess the Nature of the Forum Conflicts With Decisions of this Court and Several Circuits

The panel's decision illustrates the necessity for clarification of a fundamental issue in public forum doctrine: namely, what evidence to consider in determining the nature of a forum (*i.e.*, whether it is a public, designated, or nonpublic forum). By accepting Amtrak's *post hoc* assertions over contrary evidence of Amtrak's prior administration of its policy, arbitrarily confining its analysis to one particular billboard, and ignoring the physical characteristics of Penn Station, the panel applied a public forum doctrine that does little more than rubber-stamp the government's assertion regarding the forum.

---

[14] *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996); *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995); *AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 11 (1st Cir. 1994).

[15] *Air Line Pilots Ass'n*, 45 F.3d at 1159.

The facts as found by the district court are not disputed: Amtrak repeatedly displayed noncommercial, political advertisements in Penn Station, including a five-year ad immediately in front of the Spectacular for *The Plain Truth*, a noncommercial magazine addressing social and political issues from a conservative fundamentalist perspective. By Amtrak's own account, one substantive policy governed all advertising in Penn Station, including the Spectacular. Through its practice of permitting political ads under this policy, therefore, Amtrak created a designated public forum for political ads and discriminated when it refused to display Lebron's ad. Yet the panel majority ignored this evidence and held that the Spectacular was a nonpublic forum, or at most a designated forum only for commercial ads. App., *infra*, 11a.

The panel initially justified its refusal to consider any practice or evidence beyond the particular Spectacular billboard by its "finding" that there were two policies, and by noting that Lebron sought access to the Spectacular in particular. But as the panel conceded on rehearing, there is only one policy for all of Penn Station advertising. Accordingly, even if the forum is properly limited to the Spectacular, determination of whether it is a public, designated, or nonpublic forum requires consideration of Amtrak's implementation of its policy throughout Penn Station, since the same substantive policy governed the Spectacular and all Penn Station advertising. Pursuant to that policy, any ad that appeared in the rest of Penn Station—including the *Plain Truth* ad—could have appeared on the Spectacular, and therefore that evidence must be considered in determining the legal nature of the Spectacular forum.

The panel's decision to consider Amtrak's practice only with regard to one billboard rather than to consider the implementation of its advertising policy throughout Penn Station conflicts with the Seventh Circuit's decision in *Air Line Pilots Ass'n*. The union that challenged the policy against political advertising in that case sought to display an anti-United Air-

lines ad only in O'Hare Airport's Concourse B (the concourse serving United Airlines.) Yet the Seventh Circuit did not limit its inquiry to the specific billboard or concourse to which the union sought access, but instead considered all concourse advertising at the airport. *Air Line Pilots Ass'n*, 45 F.3d at 1151-52. *See also* App., *infra*, 20a.

The panel's acceptance of Amtrak's *post hoc* policy assertion over contrary prior practice conflicts with decisions of this Court and several circuits which have insisted on the importance of considering objective evidence of practice rather than *post hoc* assertions of policy. In *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45, 47 (1st Cir. 1991), the First Circuit, in a decision joined by then-Judge Breyer, stressed that "actual practice speaks louder than words" in public forum analysis, and looked to prior uses of a school's facilities to determine that those facilities were a designated public forum. In *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013 (D.C. Cir. 1988), the District of Columbia Circuit similarly underscored the importance of past speech practices and the compatibility of plaintiffs' speech with the forum, noting that "it is from such objective factual indicia that the real intent [to create a designated forum] is often inferred even when expressed intent runs counter." 863 F.2d at 1019.[16]

---

[16] *See also Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 47 (1983) ("[i]f by policy *or by practice*" the school had opened the forum, it would create a designated public forum) (emphasis added); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("the Court has looked to the policy and practice of the government to ascertain" whether it created a designated public forum); *Concerned Women for America, Inc. v. Lafayette Cty.*, 883 F.2d 32, 33-34 (5th Cir. 1989) (looking to library's past practices to override asserted policy against use of public library for political or religious purposes); *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991) ("[o]bjective indicia of intent to create a public forum, combined with a history of consistent practice, can overcome a bare statement of contrary purpose").

As Justice Kennedy has observed, "[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring); *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, Blackmun, Stevens, Souter, JJ., concurring in judgment) ("the [public forum] inquiry must be an objective one, based on the actual, physical characteristics and uses of the property").

The relevant past practice that the panel ignored revealed that *under the same policy* Amtrak had for five years leased advertising space immediately in front of the Spectacular to *The Plain Truth*, and also had displayed ads for such entities as the New York Department of the Environment and a muscular dystrophy foundation. Indeed, Amtrak had never before rejected an ad as "political" anywhere in Penn Station. And objective evidence of Amtrak's policy—a contract with its advertising agent, TDI—expressly provided for the display of public service and nonprofit ads.[17]

The need to look to such objective indicia is especially critical here, where Amtrak invoked an unwritten, undisseminated policy that it had never before relied upon to exclude similar speakers. The panel stressed that no political ads had been displayed on the Spectacular, but it failed to note that no one had ever sought to display a political ad there before Lebron. The evidence the panel disregarded, by contrast, unambiguously demonstrated that every time anyone previously had sought to display political ads under the same policy, Amtrak had permitted them to do so.

---

[17] Applying a novel and wholly unfounded standing doctrine, the panel reasoned that Lebron lacked "standing" to rely upon Amtrak's past display of political ads in Penn Station because he sought to display his ad in one particular billboard. App., *infra*, 16a. But as Amtrak conceded, and the panel implicitly admitted on rehearing, the same policy governed all Penn Station advertising. App., *infra*, 3b.

The panel's refusal to acknowledge the relevance of Amtrak's practice of allowing political ads elsewhere in Penn Station under the same policy renders the public forum doctrine toothless. Under the panel's approach, a public school that had permitted outside Protestant and Catholic groups to use meeting rooms on its second floor could deny a Jewish group access to a larger first floor room by asserting a policy against any outside groups using school rooms. If the first floor room had not previously been used by outside groups, the school's decision would be upheld, even though other religious groups had been granted access to other rooms under the same policy. Discrimination can always be made to look neutral by narrowing the scope of analysis to ignore instances of different treatment. *See* App., *infra*, 21a, 22a-23a, (Newman, Ch.J., dissenting).

The panel also ignored physical characteristics of Penn Station that support finding a designated public forum. The publicly-owned Penn Station is a major thoroughfare and underground mall for hundreds of thousands of New Yorkers everyday. In addition to the political ads already enumerated, Amtrak has permitted all sorts of political speech in Penn Station. Copies of the noncommercial, political magazine *The Plain Truth* have been distributed freely from its advertising kiosk for years. Under the "Free Speech" access policy, anyone may receive a permit to distribute leaflets and express political points of view. News agents and booksellers advertise and sell books and magazines with political points of view throughout the station. And Amtrak has never had a complaint about political speech of any kind in the station. Thus, political speech is clearly compatible with Penn Station's other uses, in the same way political speech is compatible with a downtown sidewalk. In fact, the only thing that distinguishes the Penn Station thoroughfare from a downtown sidewalk is that it is underground.

Had the panel examined Amtrak's objective practices in administering its policy stationwide rather than deferring

to its *post hoc* justification and narrowly focusing on the Spectacular, it would have concluded that Amtrak had created a designated public forum. This Court should grant certiorari to make clear that courts may not ignore objective evidence and past practice under the same asserted policy in determining the nature of a public forum.[18]

II. The Panel's Decision that Amtrak's Policy Is Viewpoint-Neutral Conflicts with Decisions of This Court and Other Circuits

The court of appeals correctly recognized that government must be viewpoint-neutral in allocating speech access to its property even in a nonpublic forum,[19] but erred in finding that Amtrak's rejection of Lebron's ad as "political" was viewpoint-neutral. The panel's decision in this respect conflicts with decisions of this Court and several Circuits.

First, in light of Amtrak's prior display of political ads under the same policy, the panel's decision conflicts with decisions of the First and Tenth Circuits holding that government may not use viewpoint grounds to depart from past practice in allocating access to a nonpublic forum. In *AIDS*

---

[18] The panel majority's failure to consider the physical characteristics and prior uses of Penn Station and its advertising also creates a conflict with this Court's plurality decision in *International Soc'y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 690-91. In that case, the Court held that a restriction on leafleting was not "reasonable in light of the purposes of the forum" because there was no evidence that leafleting would cause any disruption of the airport's other uses. Here, had the panel considered the evidence showing that prior political speech in Penn Station had never created a problem, it should have found Amtrak's policy unreasonable, just as the Court did in *Lee*. The only reason the panel gave for the policy—avoiding the appearance of favoring some political views—simply cannot be squared with the fact that Amtrak has for years allowed the display of political ads and has permitted other political speech in Penn Station, including even solicitation for political causes, without any adverse effects.

[19] *Lamb's Chapel*, 508 U.S. at 394.

Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 11 (1st Cir. 1994), the First Circuit held that the MBTA engaged in viewpoint discrimination when it refused to display AIDS ads on the ground that it was sexually explicit when it had previously displayed an equally sexually explicit ad for the movie *Fatal Instinct*. Similarly, in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1277-1279 (10th Cir. 1996), the Tenth Circuit held that a senior citizen center's refusal to show a religious film based on a policy prohibiting "sectarian instruction and religious worship" was viewpoint discriminatory where the center previously allowed a number of classes in which religion or religious matters were "the primary focus."

In contrast to these decisions, the panel here treated as viewpoint-neutral Amtrak's rejection of Lebron's ad as "political," even though Amtrak had for five years displayed political ads for *The Plain Truth* immediately in front of the Spectacular.[20]

Second, even putting aside Amtrak's prior display of political ads, the panel's decision conflicts with recent decisions of this Court and two Circuits holding that policies denying access on the basis of perspectives rather than subject matter are viewpoint-based. In *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995), the Seventh Circuit held that a virtually identical policy against "political" advertising in O'Hare Airport would constitute viewpoint

---

[20] In the lower courts, defendants' attorneys characterized Lebron's ad as a "political attack ad," and sought to distinguish the other political ads Amtrak displayed on that basis. Defendants' attorneys never explained how one might distinguish a "political attack" ad from a "political" ad, much less how one could do so in a constitutional manner. But more importantly, even if one could in theory draw a coherent distinction between the two, Amtrak's asserted policy draws no such distinction, but simply bans "political" ads. Nor did any of Amtrak's employees draw such a distinction. The government's action must of course stand or fall on its own terms, not on terms made up by its attorneys after the fact.

discrimination if "the proposed [advertisement] dealt with a subject that was 'otherwise permissible' in a given forum." There is no dispute that the subject matter of Lebron's ad—whether to buy Coors beer—was otherwise permissible under Amtrak's policy. Coors could have displayed an ad urging people to buy its beer, and Anheuser-Busch could have displayed an ad urging people to forgo Coors beer for Budweiser. Amtrak's sole objection to Lebron's ad was that he urged viewers not to buy Coors beer *for political reasons*.[21]

The Seventh Circuit's decision is consistent with this Court's decision in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), which invalidated as viewpoint-based policies barring "religious" speech where the government supported nonreligious speech addressing the same subject matter. In *Rosenberger*, the Court expressly rejected the "assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints," reasoning that "[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.* at 831. If excluding all "religious" views on an otherwise includible subject is viewpoint discrimination, so is Amtrak's exclusion of "political" views on the includible subject of whether to buy a product.

The panel declined to follow *Lamb's Chapel* and *Rosenberger*, and instead purported to follow *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). App., *infra*, 15a-16a

---

[21] Similarly, in *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997), the Eleventh Circuit held that a university's refusal to fund a gay and lesbian student group based on a statute that prohibited funding for groups that promoted "a lifestyle or actions prohibited by the sodomy and sexual misconduct laws," was "blatant viewpoint discrimination" where the law permitted funding of groups which promoted compliance with the sodomy or sexual misconduct laws.

and n.4. In *Lehman*, a plurality upheld a policy against partisan political advertising on the interiors of municipal buses. But *Lehman* did not address whether the policy it upheld was viewpoint-based in the sense that this Court used that concept twenty years later in *Lamb's Chapel* and *Rosenberger*.[22] In fact, the panel's reliance on *Lehman* to find Amtrak's policy viewpoint-neutral conflicts sharply with *Lamb's Chapel* and *Rosenberger*.

The Court should grant certiorari to resolve whether government may exclude speech from a forum as "political" where it accepts speech that addresses the same subject matter from other perspectives.

III. The Panel's Decision that Amtrak's Policy is Not Unconstitutionally Vague Conflicts with This Court's Decision in *Hynes v. Mayor of Oradell*

According to the district court's findings—none of which Amtrak challenged—the meaning of Amtrak's ban on "political" advertisements was a mystery to everyone responsible for enforcing it. App., *infra*, 17c.

Even Anthony DeAngelo, the Amtrak official with ultimate responsibility for Amtrak's advertising policy, could not offer a coherent definition of it: "at times [he] indicated that the policy prohibited only those advertisements that were both 'political' *and* divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service." App., *infra*, 17c. Another Amtrak official, who reviews advertising material submitted for the Spectacular, "knew that there was a policy barring 'political' advertisements, but he could not really say what such a policy meant." *Id.* The policy "was not even known to many of those responsible for billboard advertising." App., *infra*, 16c. And notwithstanding the

---

[22] As detailed below, the policy upheld in *Lehman* was significantly different from Amtrak's. *See infra* section III.

asserted unwritten policy against political advertising, written standards in the TDI-Amtrak contract governing Penn Station advertising expressly *permitted* noncommercial public service ads. App., *infra*, 19c.

Under this Court's decisions in *Hynes* and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), such a policy is unconstitutionally vague. In *Hynes*, the Court held that a law requiring persons soliciting for a "political . . . cause" to obtain permits was unconstitutionally vague because the law did not define "political" cause. 425 U.S. at 621-22. *Hynes* is controlling here, as Amtrak relies on the same undefined term, and has not even put its policy in writing. *See also Air Line Pilots Ass'n*, 45 F.3d at 1154 n.7 ("the content of the word 'political' is not immediately obvious . . . . [It] is not self-defining"); *id.* at 1162 (Flaum, J., concurring) ("the very terms 'political' or 'nonpartisan' are themselves insusceptible of principled application") (citation omitted).

In *Lakewood*, the Court held that a policy governing access to newsboxes on public property gave the mayor "unfettered discretion," and was therefore unconstitutional. 486 U.S. at 772. The unwritten and undefined character of Amtrak's policy affords Amtrak officials similarly unguided discretion; DeAngelo said he offers his employees no instruction in the policy, and expects them to apply their "common sense." A359-60, A362-65, A386-88.

The panel upheld Amtrak's policy by likening it to the policy upheld in *Lehman*. App., *infra*, 14a. But there are two fundamental flaws in that reasoning. First, *Lehman* did not even address a vagueness claim. Second, Amtrak's policy is substantially more open-ended than the policy upheld in *Lehman*. The *Lehman* policy was in writing, and had been authoritatively construed by the Ohio Supreme Court to limit advertising space to " '[p]urveyors of goods and services saleable in commerce.' " 418 U.S. at 303-04 (*quoting Lehman v. City of Shaker Heights*, 34 Ohio St.2d 143, 146, 296 N.E.2d 683,

685 (1973)). In addition, there was "uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system . . . had not accepted or permitted *any* political or public issue advertising on its vehicles." *Id.* at 300-01.[23]

By contrast, Amtrak's policy is unwritten, undefined, contrary to its own written standards, and has been inconsistently applied. Amtrak's policy is as different from the written, consistently-applied, and authoritatively-construed policy upheld in *Lehman* as were the policies this Court invalidated in *Hynes* and *Lakewood*. The Court should grant certiorari to resolve the confusion created by the Second Circuit's misguided reliance on *Lehman*.

---

[23] In addition, *Lehman* rested on a captive audience rationale not applicable here. The Court in *Lehman* was unable to obtain a majority opinion, and the narrowest opinion upholding the result was that of Justice Douglas, who based his opinion on the fact that riders on the bus were a "captive audience," and that speakers have no right to address a captive audience. 418 U.S. at 308 (Douglas, J., concurring). Since then, the Court has restricted the "captive audience" rationale to settings in which there is a substantial intrusion on privacy. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 n.5 (1975).

In a host of cases challenging restrictive municipal transportation facility advertising policies, *Lehman* has virtually always been distinguished, either on grounds that facially similar policies had not been consistently applied, or that the "captive audience" rationale was inapplicable. *See, e.g., Air Line Pilots Ass'n*, 45 F.3d at 1153 (*Lehman* inapplicable where policy not consistently applied); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1232-33 (7th Cir. 1985) (same); *Lebron v. Washington Metropolitan Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (*Lehman* distinguished because transit authority had accepted political ads in the past); *Hevesi v. Metropolitan Transp. Auth.*, 827 F. Supp. 1069 (S.D.N.Y. 1993) (same); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 767 (D.C. Cir. 1983) (distinguishing ads in bus interiors from ads in airport because "[a] person in the airports' concourses or walkways who considers an advertisement . . . objectionable enjoys the freedom simply to walk away that a passenger on a bus does not"); *Penthouse Int'l, Ltd. v. Koch*, 599 F. Supp. 1338, 1347 (S.D.N.Y. 1984) (ads posted in "open public areas of the subway stations" do not implicate "captive audience" concerns).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID D. COLE
Counsel of Record
CENTER FOR CONSTITUTIONAL RIGHTS
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

GLORIA C. PHARES
JEFFREY H. BLUM
PATTERSON, BELKNAP, WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

R. BRUCE RICH
BERNADETTE M. MCCANN EZRING
JONATHAN BLOOM
MARC BROTMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

April 1998